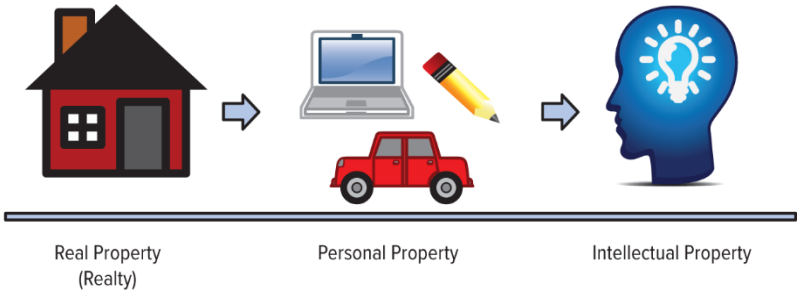
Part 1 The Legal Environment of Business CHAPTER 8 Real, Personal, and Intellectual Property Page 172 CASE OPENER Smartphone Wars: Focus on Technology Companies In the past five years, there have been significant innovations in technology such as smartphones and tablets. Technology companies rely on intellectual property law (IP), such as patents, trademarks, copyright, and trade secrets, to protect their innovations. For example, Apple and Samsung, the two largest smartphone companies, have filed various patent infringement suits against each other in courts around the world. Apple and Samsung are strong competitors, so if one company were able to obtain an injunction preventing the other company from selling certain phones and tablets, this injunction could be devastating to the losing company. In one of these cases that proceeded to a jury trial, Apple argued that Samsung copied Apple's design of the iPhone and iPad—specifically, that Samsung copied the rounded rectangle shape of the iPhone, in violation of Apple's design patent and the iPhone's trade dress. Steve Jobs, the former CEO of Apple, emphasized the importance of neat, clean design for Apple products, and Apple has thus sought and received hundreds of design patents, along with trademarks, protecting its products. Similarly, Samsung has asserted a number of its own patents against Apple, including a patent covering the ability to send photos from a camera phone. Critics argue that these patents and trademarks are too broad (i.e., that something as simple as a rounded rectangle or sending a photo from a phone should not be protected by patents or trademarks). Critics further argue that such broad IP stifles innovation and prevents smaller players from entering the market because they cannot withstand the costs of litigation associated with competing in the smartphone and tablet markets. In response, the patent owners argue that they have expended significant resources in creating their products and deserve to avail themselves of the protection afforded by IP. Critics further argue that technology companies spend millions of dollars on litigation rather than on developing and improving products. Technology companies respond that they have no choice but to seek enforcement of their intellectual property through the legal system. Furthermore, in January 2013, Apple Computer was granted a trademark for its retail store design and layout.1 Specifically, the trademark covers the design, the shelves in the store, and the location of the tables displaying products. One of the main reasons this trademark was important to Apple was that fake Apple stores in China confuse customers. Do you think technology companies should be able to receive protection for allegedly basic ideas (e.g., store design or shape or color of a product) and functionalities? How does intellectual property litigation between competitors (such as Apple and Samsung) affect you? Page 173 LEARNING OBJECTIVES LO 8-1 Explain how the topics of real, personal, and intellectual property are related. LO 8-2 Describe how real property law balances private and public rights. LO 8-3 Outline the interests in real property that someone can hold. LO 8-4 Identify the types of personal property. LO 8-5 Describe how personal property is

transferred. LO 8-6 Describe how intellectual property law balances private and public rights. LO 8-7 Differentiate among the methods for protecting various types of intellectual property. Most Americans cherish the right to own property. For most Americans, this means the right to own real property, such as a house. Increasingly, Americans also cherish the right to own intellectual property, the fruits of the mind, such as a manuscript for a novel. In this chapter, we examine the nature of both real and intellectual property, as well as personal property. The chapter starts by exploring how the three areas of law are related. Then, for each of these types of property, the chapter considers what interests individuals can hold and how the laws governing these types of property balance private and public rights. The Case Opener considers an intellectual property issue. By the end of the chapter, you will see that disputes such as the Samsung–Apple dispute can arise not only when the property in question is intellectual but also when it is personal property.

The Nature of Real, Personal, and Intellectual Property LO 8-1 Explain how the topics of real, personal, and intellectual property are related. The type of ownership interest a person has in a piece of property determines his or her rights to the property. Real property, commonly referred to as realty, is land and everything permanently attached to it. Personal property consists of tangible, movable objects. Intellectual property consists of the fruits of one's mind. The laws of intellectual property protect property that is primarily the result of mental creativity rather than physical effort. When we are thinking about property rights of any kind, it is important to remember that society, through laws, decides what rights individuals and communities have with regard to property. Exhibit 8-1The Nature of Real, Personal, and Intellectual Property One metaphor often used with regard to property is that of a bundle of sticks. Each stick represents a distinct right an individual can have with regard to property. The rights to possess property, use it, give it away, or take it away are all sticks. With regard to all types of property, one of the most important rights is the right to exclude others. For example, with regard to real property, an individual can put a fence around the land and ask others to stay off the land. With personal property, you may simply keep it in a place where no one else has access to it. For intellectual property, an individual can accomplish the same thing with a trademark or patent—the holder can put a virtual fence around the idea trademarked or patented and ask others to refrain from using the property. Page 174 With regard to real property, some other important sticks are the rights to sell, lease, or mortgage land and the right to allow someone limited access. The public also has important sticks, such as the right to take land, regulate it, and/or tax it. In the next section, the various types of interests a person may have in real property are described in detail. These interests may be conveyed or transferred under legal guidelines for property rights. Most transfers of property are voluntary. However, for the benefit of the public, and

to protect public health, safety, and welfare, the government may require involuntary transfers of property.

The Nature of Real, Personal, and Intellectual Property



Real Property LO 8-2 Describe how real property law balances private and public rights. There are a number of types of interests in land, ranging from temporary to permanent to future. The duration of one's ownership interest and the power one has over using the land depend on the type of estate one is said to hold. The following section on interests in real property describes the various estates in detail. First, though, this chapter explores the landowner's rights that pertain to areas beyond the surface of the land itself. Extent of Ownership When a person owns land, they own more than just the surface. The airspace above the land, extending to the atmosphere, is also part of the legal concept of real property. Rights to airspace generally do not generate much controversy, but occasionally disputes arise that involve aircraft flying too low over individuals' property. Alternatively, a tree's branches may hang over into the airspace of the property next door, and the owner of that airspace may want to cut the overhanging branches. In dense, commercial urban areas, airspace may actually be an asset. Owners of two commercial buildings might want to build an overhead walkway joining their buildings across a parking lot that you own. They will have to pay you handsomely for the right to build in your airspace. In addition to having airspace rights, the owner of real property also has water rights, the legal ability to use water flowing across or underneath the property. However, these rights are somewhat restricted; one cannot deprive the landowners downstream from the use of the water by diverting the water elsewhere. Finally, ownership of real property extends to mineral rights; these rights involve the land below the surface. The landowner has the legal ability to dig or mine the materials from the earth and may sell or give these rights to another person. Ownership of these subsurface rights includes the right to enter onto the property to remove the underground materials. All these additional rights are illustrated in Exhibit 8-2.

Page 175 Exhibit 8-2Extent of Rights Interests in Real Property LO 8-3 Outline the interests in real property that someone can hold. Various interests in land are discussed in the following sections and summarized in Exhibit 8-3. Exhibit 8-3Possessory Estates in Land INTEREST EXTENT OF RIGHTS Leasehold estate Right to possess property for an agreed-on period of time Life estate Right to possess property until death, subject to restriction against waste Conditional estate Right to possess property by which the holder has the same interest as that in a fee simple absolute except that this interest is subject to a condition. Fee simple absolute Right to possess property for life and pass it to heirs on death; the most encompassing interest Fee Simple Absolute With regard to estates in land, a fee simple absolute is the most complete estate a person may have. Exclusive rights to ownership and possession of the land belong to the person who has a fee simple absolute. It is this type of estate to which most people refer when they speak of buying a house or piece of land. A fee-simple-absolute interest is passed to the owner's heirs when the owner of such an estate dies. Conditional Estate The owner of a conditional estate possesses the same interest as the owner of a fee simple absolute except that this interest is subject to a condition: If a certain required event fails to occur or a specific prohibited event occurs, the interest will be terminated. For example, Todd may be given property rights to a Victorian house on the condition that he is to preserve it in its original form. If he violates this condition by turning the house into a piano showroom or a beer hall, the house will either revert to the original owner or be transferred in accordance with the terms of the deed. (The deed is the instrument used to convey real property.) Life Estate A life estate is granted for the lifetime of an individual; the right to possess the property terminates at the individual's death. On the death of the holder of the life estate, the property will go to another party as designated by the original grantor. Thus, this future owner has an interest in seeing that the life tenant does not waste the property; in other words, the life holder is not allowed to neglect or abuse the property in a way that diminishes the property value. If the life tenant fails to make necessary repairs or uses the property in ways damaging to its future value, the future holder could bring legal action against the holder of the life estate to recover damages for waste. Page 176 Future Interest A future interest is a person's present right to property ownership and possession in the future. Such an interest usually exists in conjunction with a life estate or a conditional estate. For example, Joe owns a life estate in Oak Hills Apartments, and on his death the property will pass to Sarah with fee-simple-absolute rights. Sarah, in this case, holds a future interest in Oak Hills Apartments, and if Joe allows the buildings to deteriorate from neglect, Sarah may sue Joe to enjoin him from engaging in waste of the property. Leasehold Estate The interest of a leasehold differs from the interests previously described in that the holder of such an estate has a possessory interest but not an ownership interest. This interest is transferred by a contract known as a lease. Both the owner of the property (the lessor, or landlord) and the tenant (the lessee)

sign the lease. The contract generally specifies the property to be leased, the amount of the rent payments and when they are due, the duration of the leasehold, and any special rights or duties of either party. A leasehold gives the lessee, or tenant, exclusive rights to the use and possession of the land, including the right to exclude the property owner under most circumstances, for the term specified by the lease. The tenant's and landlord's rights and obligations may vary according to the lease, but some states have statutes requiring landlords to keep the property in good condition for the tenant's use and giving the tenant the right to withhold rent payments if the landlord fails to maintain the premises. However, if the tenant fails to make the agreed-on payments without such grounds, the landlord may evict the tenant. The landlord is not allowed to enter the property except when there is an emergency or when the tenant has given permission to enter to make repairs. Near the end of the leasehold, the landlord may enter with notice to the tenant for the purpose of showing the property to a potential tenant. GLOBAL Context Digital Archive Japan/Alamy Stock Photo Property Interests in Vietnam In the United States, we take for granted the right to go out and purchase a piece of property if we have the money to do so. Property is not so freely available and transferable in all nations. Vietnam's new constitution, written in 1992, provides guidelines for the allocation, transfer, and sale of private property. However, the constitution still asserts that the people, or the state, own all the land. Thus, if individuals or private enterprises want to use land, they must pay tax on it as a form of rent. Those who agree to pay the tax on the land are granted a use of right, which entitles them to extended use. The use of right also gives the renter the freedom to transfer the property. Technically, it is not the property that is being transferred but, rather, the right to use the property. Transference of property can occur only with the approval of a state official. The official ensures that the new owner intends to use the land for the original, state-approved purpose. Moreover, the new owner can never be given a longer term of right or more extensive rights over the land than the original owner had. Finally, the state official determines the price at which the property will be transferred. The government has specified certain prices depending on how the land is used. Considering the involvement of the state in such property transactions, the extent to which the Vietnamese enjoy private property rights is limited. Subleasing of the property by the tenant to another party is permissible unless specifically prohibited by the lease. However, the initial tenant is liable throughout the entire term of the lease for payment of the rent to the landlord. Page 177 Nonpossessory Estates Although most people think of interests in land as being possessory in nature, some estates do not include the right to possess the property. Such interests include easements, profits, and licenses. Easements and profits are similar in that they are neither ownership nor possessory interests, and they are subject to similar rules, but they are not exactly the same. An easement is an irrevocable right to use some part of another's land for a specific purpose without taking anything from it. A profit is the

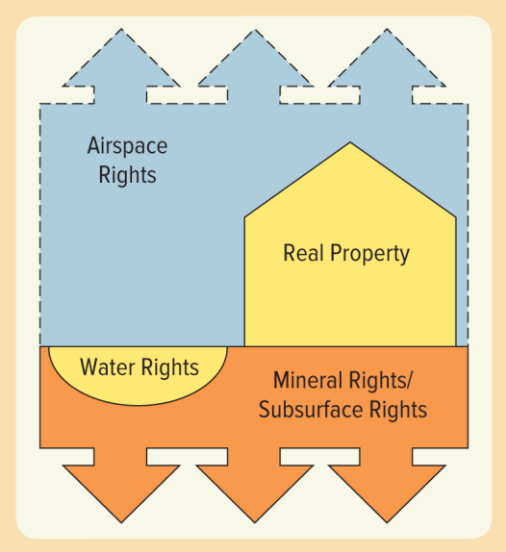
right to go onto someone's land and take part of the land or a product of it away from the land. For example, if Bill has the right to drive his car across Jenny's property to get to his property, he has an easement; but if he has the right to go onto her property and remove the topsoil he needs from it for his landscaping business, he has a profit. Easements and profits can be transferred in multiple ways: by express agreement, inheritance, necessity, implication, or prescription. If the land that benefits from the easement or profit is sold, the nonpossessory interest goes with the property. Thus, if Bill sold his land to Sonny, Sonny would also receive the easement across Jenny's property. Similarly, if Jenny sold her property, the new owner would have the burden of Bill's easement as long as it had been properly recorded. Of course, just as easements and profits can be created, they can also be terminated, with the most common method of termination being by agreement. The easement holder may simply deed the easement back to the property owner. If the easement arose by necessity and the necessity no longer exists, the easement would terminate. A license is a right to use another's property that is both temporary and revocable. For example, when a person purchases a theater ticket, he or she has the right to a specific use of the property for a limited time, subject to good behavior. No property interest goes to the license holder. Property Transfer The owner's ability to transfer real property is part of the value of property. Any or all of the owner's property may generally be transferred to anyone for any price or no price, as the owner desires. However, to effectuate such a transfer, the owner must follow certain legal procedures. These procedures are execution, delivery, acceptance, and recording (see Exhibit 8-4), the last of which is required to protect the recipient of the property. Such a transfer is presumed to be the conveyance of a fee simple absolute unless the contrary is stated. The legal document used to voluntarily convey the property is called the deed. There are different types of deeds, but any properly drafted deed must contain the following: Identification of the grantor, the person conveying the property, and the grantee, the person receiving the property. An expression of the grantor's intent to convey the property. A legally sufficient description of the property, including its physical boundaries and any easements. Any warranties or promises made by the grantor in conjunction with the conveyance. Page 178 The most commonly used deed, the general warranty deed, contains certain warranties or promises by the grantor. Such covenants may vary slightly by state but generally promise that The grantor owns the interest being conveyed. The grantor has the right to convey the property. There are no mortgages or liens against the property unless stated in the deed. The grantee will not be disturbed by anyone who has a better claim to title of the property, and the grantor will defend the grantee's title against such claims or reimburse any money spent in their defense and/or settlement. The grantor will provide any additional documents the grantee needs to perfect their title to the property. A grantor may not necessarily feel comfortable making all those warranties and may instead execute a

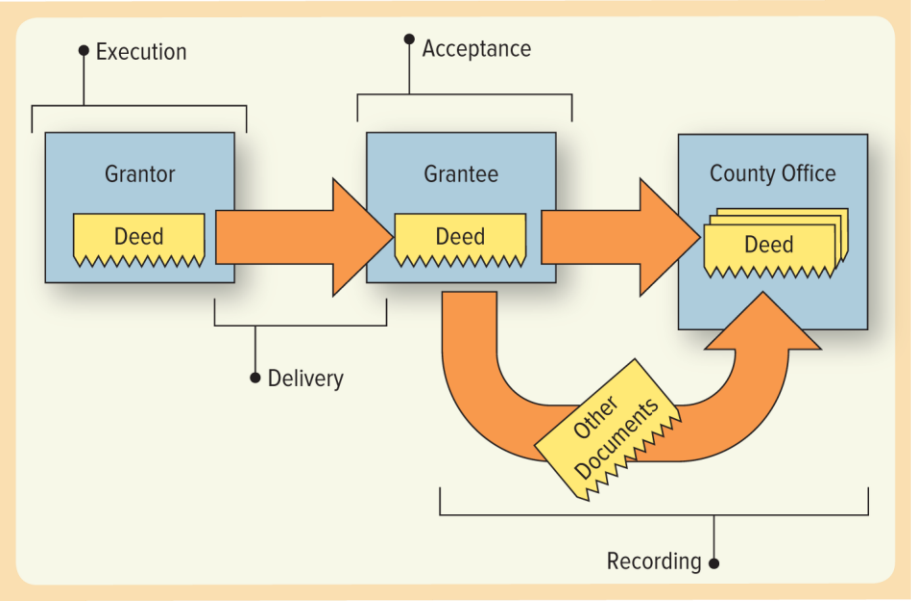
special warranty deed, which provides only two warranties—that the grantor does hold title to the property, and that the property was not encumbered during the grantor's period of ownership. A third type of deed is the bargain and sale deed, which only guarantees that the holder has title to the property. From the grantee's perspective, the least desirable type of deed is the quitclaim deed. It carries no warranties; the grantor simply conveys whatever interests he or she holds. Thus, if the grantor had a defective title, the grantee receives a defective title. Because of the insecurity of such a deed, very few grantees accept it. Exhibit 8-4Steps in a Voluntary Transfer The transfer of the owner's interest in real property is not always voluntary. Transfer of property may also take place without the owner's knowledge and even, in some cases, against his or her will by either adverse possession or condemnation. In adverse possession, a person takes ownership of property by treating a piece of real property as their own, without protest or permission from the owner. Most states have established statutes determining a length of time after which such a possessor receives the ownership interest in the property. The exact lengths of time vary from state to state, but adverse possession must be actual (the person lives on or uses the land as an owner would), open (not secretive), and notorious (without the owner's permission). In some states, the adverse possessor must have performed certain acts such as the payment of real estate taxes. In other states, such possession must have taken place under color of title; in other words, the adverse possessor was operating under the assumption that he or she actually held the title to the land. Condemnation is the legal process by which a transfer of property is made against the protest of the property owner. As you will remember from Chapter 5's discussion of the takings clause of the Fifth Amendment, the government has a constitutional right to take private property for the use of the public provided it pays the owner fair compensation. This right may be exercised at any government level, and sometimes it is exercised on behalf of a private company operating to benefit the public. When the government decides to exercise its power of eminent domain, it will first make an offer to purchase the property for what it believes is the fair market value. If the owner either does not want to sell or feels the price is too low, the government will initiate a condemnation proceeding, and the court will determine whether the government body bringing the action has a valid claim that the taking is for a legitimate public purpose. If the court determines that, in fact, the taking of the property will benefit the public interest, the court will then determine the fair market value of the property. This price will be paid to the owner, and the property will be transferred to the government. It is sometimes difficult to determine whether the exercise of eminent domain is actually for the public's benefit when the property will be conveyed by the government to another private individual. Since the 1980s, businesses increasingly have been appealing to cities to use their power of eminent domain to assist the businesses in acquiring land that the owners have not wanted to sell. Because this transference of property from one private

individual to another is for the alleged public use of economic development, an increasing number of state supreme courts began to address the issue of whether economic development was a public use under the constraints of the Fifth Amendment. Some state supreme courts found that job creation and expansion of the tax base did constitute public use, whereas other courts found that they did not constitute public use. The U.S. Supreme Court finally settled the issue—at least for the present time—in the 5-4 decision summarized in Case 8-1. Page 179 CASE 8-1 KELO v. CITY OF NEW LONDON United States Supreme Court 126 S. Ct. 326 (2005) FACTS: New London, a city in Connecticut, used its eminent domain authority to seize private property to sell to private developers. The city said developing the land would create jobs and increase tax revenues. Susette Kelo and others whose property was seized sued New London in state court. The property owners argued that the city violated the Fifth Amendment's takings clause, which guarantees that the government will not take private property for public use without just compensation. Specifically, the property owners argued that taking private property to sell to private developers was not public use. The Connecticut Supreme Court ruled for New London. ISSUE: Does a city violate the Fifth Amendment's takings clause if the city takes private property and sells it for private development, with the hopes the development will help the city's bad economy? REASONING: The city's taking of private property to sell for private development qualified as a public use within the meaning of the takings clause. The city was not taking the land simply to benefit a certain group of private individuals but was following an economic development plan. Such justifications should be given deference. The takings here qualified as public use even though the public would not use the land. The Fifth Amendment did not require literal public use, the majority said, but the "broader and more natural interpretation of public use as 'public purpose.'" O'Connor's dissent: An unelected (therefore voter-unaccountable) private nonprofit corporation was the primary beneficiary of the government taking. "Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms." The decision eliminates "any distinction between private and public use of property—and thereby effectively delete[s] the words 'for public use' from the Takings Clause of the Fifth Amendment." DECISION AND REMEDY: The city has not violated the Fifth Amendment. Affirmed, for New London. SIGNIFICANCE OF THE CASE: The U.S. Supreme Court expanded significantly what constitutes public use. Many people believe the Supreme Court went too far—they agree with Justice O'Connor's opinion. CRITICAL THINKING When you examine the reasoning in both the majority and dissenting opinions, you can see that a significant conflict between the opinions exists because of the ambiguity of a key term. Identify this term and explain how its interpretation affects the reasoning. How do you think

the courts should define the term? ETHICAL DECISION MAKING Who are the primary stakeholders involved in this case? How are they affected by the ruling? What are the implications of this ruling in terms of the distinction between public and private property? Further, this case highlights an important value conflict. Can you explain how certain values would lead one to support the majority opinion, whereas different values would lead one to support the dissenting opinion? How might holding a different value determine how one predicts the implications of this ruling? Page 180 GLOBAL Context Digital Archive Japan/Alamy Stock Photo Eminent Domain in Germany Germany has both federal and state (Lander) regulations governing eminent domain. The federal system is similar to that in the United States, but one difference is that most of its eminent domain laws are incorporated through statutes, not through cases as in the United States. The German federal government may expropriate land for the public good as long as it provides compensation. Germany's basic law provides that "Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected." Compensation in the German system is not based on fair market value alone but must also consider the interests of those affected. Germans may dispute the amount of compensation in the ordinary courts. A taking requires the government to have the legal authority for the taking. The taking must also be appropriate for accomplishing the government's purpose and must be done in the least intrusive way possible, meaning that the government cannot take property before it needs it, and it can take only the property it needs. The taking must also pass a balancing test, showing that the public's interest is greater than the owner's interest. One other difference in Germany is that if the German government no longer needs the property, it must revert to its former owner. In the United States, once the government has provided just compensation for the property, it belongs to the government. Whereas the Kelo case involves government attempts to take property from individuals to sell to companies, sometimes governments seek to take the property of one company for use by another company. For instance, in June 2000, Costco, a large retail chain, wanted to expand its warehouse in Lancaster, California. Afraid of losing the large store, which threatened to move if it could not expand, the city considered using its eminent domain powers to acquire an adjacent 99 Cents Only store so that Costco could obtain the property. This example demonstrates that even businesses may be at risk of losing their property to larger, more powerful businesses. The response to the Kelo decision was widespread. President George W. Bush issued an executive order limiting the taking of private property by the federal government to "situations in which the taking is for public use, with just compensation, and for the purpose of benefiting the general public, and not merely for the purpose of advancing the economic interest of private parties to be given ownership or use of the property taken." During the year and a half after Kelo, 30 state legislatures enacted statutes limiting the use of eminent domain. Additionally, in 2006,

nine states passed ballot measures restricting the definition of public use for purposes of eminent domain. Thus, it appears that the ultimate impact of the Kelo decision will be the opposite of what that decision held; by statute, a much more restrictive definition of public use will govern government takings. The case is also important because it shows how constitutional issues directly affect areas of the law, such as property law.





Personal Property LO 8-4 Identify the types of personal property. All property that is not land or not permanently affixed to land is personal property. Personal property may be either tangible or intangible. Tangible property is property that can be identified by the

senses. It is property that you can see or touch. Tangible property includes items such as furniture, cars, and other goods. Page 181 Books are typically thought of as personal property. The owner of a book may write in it and generally do what he or she wants with it, and the law protects the owner against having the book taken by someone else. However, the growing popularity of e-books has raised questions about what rights e-book users have to their e-books. In July 2009, Amazon deleted copies of George Orwell's 1984 and Animal Farm directly off people's Kindles (Amazon's e-book reader) and refunded their money. This action has sparked massive controversy over whether Amazon has the right to remove content that customers had bought from their Kindles. At least one lawsuit has already been filed as a result of this incident. Much of the outrage has been because people do not see e-books and physical books as different types of property. Businesses that offer digital content should be clear about what rights customers have to the content, and they should make that information well known and visible to avoid problems like the one Amazon is faced. Intangible property includes such items as bank accounts, stocks, and insurance policies. Because most intangibles (with the exception of some that are classified as intellectual property and discussed later in this chapter) are evidenced by writings, most of the following discussion applies to both tangible and intangible property. The primary issues that arise in conjunction with personal property involve the means of acquiring ownership of the property, which is discussed in the next section. Voluntary Transfer of Property LO 8-5 Describe how personal property is transferred. Voluntary transfer, as a result of either a purchase or a gift, is the most common means by which property is acquired. Ownership of property is referred to as title, and title to property passes when the parties so intend. When transfer of the property is by purchase, the acquiring party gives some consideration to the seller in exchange for title to the property. Such a transfer of ownership usually requires no formalities, but in a few cases, changes of ownership must be registered with a government agency. Sales of motor vehicles, watercraft, and airplanes are among the primary transfers requiring registration. To transfer such property, a certificate of title must be signed by the seller, taken to the appropriate government agency, and then reissued in the name of the new owner. Gifts are another voluntary means of transferring ownership. They differ from purchases in that a promise to make a gift is unenforceable. Once properly made, however, a gift is irrevocable. Three elements are necessary for a valid gift. First, there must be a delivery of the gift. Delivery may be actual, which is the physical presentation of the gift itself, or constructive, which entails the delivery of an item that gives access to the gift or represents it, such as handing over the keys to a car. Second, the delivery must be made with donative intent to make an immediate gift. The donor makes the delivery with the purpose of turning over ownership at the time of delivery. Third, there must be acceptance, a willingness of the donee to take the gift from the donor. Usually, acceptance is not a problem, although a donee may not want

to accept a gift because of a desire not to feel obligated to the donor or because of a concern that ownership of the gift may impose some unwanted legal liability. Sometimes, however, it can be difficult to determine whether something is a gift or a loan, especially when proper documentation is not filed at the time of the transaction. This was the scenario faced by Don Whittington when he disputed ownership of a 1979 Kremer Porsche displayed at the Indianapolis Motor Speedway Hall of Fame Museum. Whittington believed that he was the owner of the Porsche and that he had merely loaned it to the museum in 1980. The Indianapolis Motor Speedway Foundation believed that Whittington had given the car as a gift to the museum, and the foundation had even applied for and been granted a title to the car in 2001. In 2004, when Whittington requested the return of the car, he had to prove that he had a possessory interest in the car. Although the museum did not have a record of receiving the car as a gift or a loan, and Whittington had never applied for a tax reduction for giving the car as a gift and was able to produce one document in which he listed the car as an asset, the trial court found in favor of the foundation. The court determined that Whittington's behavior after the museum took possession of the car was more consistent with giving the car as a gift than as a loan. The gifts we have been discussing so far have been what are called inter vivos gifts, gifts that are made by a person during his or her lifetime. Another type of gift that can be made is a gift causa mortis, a gift that is made in contemplation of one's immediate death. It can be revoked any time before the death of the donor, and it is automatically revoked if the donor recovers. Page 182 Litigation over gifts causa mortis often arises because the three elements of delivery, donative intent, and acceptance still have to occur before the gift is complete, and that means before the death of the donor. It can sometimes be difficult to determine whether in fact all the elements of a gift causa mortis have been met. Involuntary Transfer of Personal Property Involuntary transfers of ownership occur when property has been abandoned, lost, or mislaid. The finder of such property may acquire ownership rights to such property through possession. Lost property is property that the true owner has unknowingly or accidentally dropped or left somewhere. He or she has no way of knowing how to retrieve it. In most states, the finder of lost property has title to the lost good against all except the true owner. Mislaid property differs from lost property in that the owner has intentionally placed the property somewhere but has forgotten its location. The person who owns the realty on which the mislaid property was placed has the right to hold the mislaid property. The reason is that the true owner likely will return to the realty looking for the mislaid property. In some states, the law requires that before becoming the owner of lost or mislaid property, a finder must place an ad in the paper that will give the true owner notice that the property has been found and/or must leave the property with the police for a statutorily established reasonable period of time. Property that the original owner has discarded is abandoned property. Anyone finding such property becomes its owner by possessing it. For

example, Karen is on vacation and decides that she doesn't really need her umbrella and doesn't want to carry it the rest of the trip, so she leaves the umbrella on a seat in the airport. If Bill then picks it up and takes it with him, he is now the lawful owner of the umbrella. Other Means of Acquiring Ownership of Property There are additional means by which people acquire title to property. One such means is by creation: If a person creates a piece of property, then he or she owns that property. One exception to this rule occurs when a person is paid to create property for someone else, in which case the property is owned by the person who paid for its creation. Another means of acquiring ownership is by court order. In a number of types of cases, the court will determine who is entitled to ownership of property. For example, in a divorce case, the court may award ownership of certain property to different parties, or in a bankruptcy case, the court may award ownership of certain property to a creditor. A far less common means of acquiring ownership is confusion, which involves only fungible goods. Fungible goods are goods for which one unit of the good is essentially the same as every other unit, such as grains of wheat or gallons of oil. If two people accidentally commingle their fungible goods, or if the goods are commingled because of the actions of a third party, each party is entitled to the percentage of the fungible goods that he contributed. However, if one of the parties was responsible for the commingling and that person cannot prove what percentage of the commingled goods she contributed, then the innocent party acquires title to all the goods. For example, if a farmer had stored grain in a rented storage elevator and another farmer wrongfully added his grain to the elevator, the innocent farmer would be entitled to the entire amount in the silo.

Intellectual Property LO 8-6 Describe how intellectual property law balances private and public rights. Intellectual property, property that comes from creativity, also carries a bundle of sticks, both for the creator of the property and for the community. The creators of intellectual property often want to keep the property to themselves. For example, creators of copyrighted work (creative work in a fixed form) do not want others to copy that work without permission. Page 183 At times, intellectual property is more complicated than real property. For example, copyright often has an impact on freedom of speech. If a songwriter creates a song, others may think they have the right to express themselves through this song, but a copyright may prevent this expression. Thus, copyright law and freedom of speech sometimes clash. Legislators and courts play an important role in responding to potential conflicts. They also balance the rights of innovators who create intellectual property with the interests of the community, especially interests in competition and freedom of expression. Courts and legislators decide what sticks to set aside for creators of intellectual property. They also decide what is left for the public, including artists and

other businesses. The following sections describe specific types of intellectual property. Trademarks LO 8-7 Differentiate among the methods for protecting various types of intellectual property. A trademark is a distinctive mark, word, design, picture, or arrangement that a producer uses in conjunction with a product and tends to cause consumers to identify the product with the producer. You probably recognize some of the famous trademarks in Exhibit 8-5. Even the shape of a product or package may be a trademark if it is nonfunctional. Exhibit 8-5Logos like those of McDonald's, Nike, and Coca Cola are all examples of well-known trademarks. Rose Carson/Shutterstock Even though the description of a trademark is very broad, there has still been substantial litigation over precisely what features can and cannot serve as a trademark. In one case, discussed in the Case Nugget, the U.S. Supreme Court grappled with the issue of whether a color can be a trademark. CASE Nugget Color as a Trademark? Qualitex Co. v. Jacobson Products Co. United States Supreme Court 514 U.S. 159 (1995) For years, the plaintiff, Qualitex Co., had colored the dry-cleaning press pads it manufactured a special shade of green-gold. When Jacobson Products, a competitor, started coloring its pads the same shade of green-gold, Qualitex sued Jacobson Products for trademark infringement. The defendant challenged the legitimacy of the trademark, arguing that color alone should not quality for registration as a trademark. The district court found in favor of the plaintiff, but the Ninth Circuit reversed, holding that color alone could not be registered as a trademark. The plaintiff appealed to the U.S. Supreme Court. In writing for the majority that a color could constitute a trademark, Justice Breyer said that both the language of the Lanham Act and the basic underlying principles of trademark law would seem to include color within the universe of things that could qualify as a trademark. He noted that the broad language used to describe trademarks included "any word, name, symbol, or device, or any combination thereof." Human beings might use as a symbol or device almost anything at all that is capable of carrying meaning. Justice Breyer noted that a particular shape (of a Coca-Cola bottle), a particular sound (of NBC's three chimes), and even a particular scent (of plumeria blossoms on sewing thread) could be trademarked, and he reasoned that if a shape, a sound, and a fragrance can act as symbols, it made sense that so could a color. He also noted that a color, if unusual enough in the context, could in fact come to identify goods with their source, just as descriptive words on a product could. The Court concluded that the green-gold color acts as a symbol that has developed secondary meaning (i.e., customers identified the green-gold color as Qualitex's) and identifies the press pads's source. The high court therefore reversed the decision in favor of the plaintiff. Page 184 Seventeen years later, courts considered whether a color can serve as a trademark in the fashion industry. Christian Louboutin designs and sells high-fashion shoes with red lacquered soles, and the red lacquered sole was registered as a trademark in 2008. In 2011, Yves Saint Laurent America, Inc. (YSL), planned to offer a line of monochromatic

shoes whose upper part matched the color of the sole, and one of these shoes had a red upper portion along with a red sole. When Louboutin learned of the red YSL shoe, Louboutin sued YSL for trademark infringement. Relying on Qualitex, the district court held that a single color could never serve as a trademark in the fashion industry because single color marks are inherently functional. On appeal, the Second Circuit determined that there was nothing about the fashion industry that should warrant treatment different from other industries. However, the Second Circuit determined that Louboutin had put the color red "in a place that seemed unusual" (Qualitex, 514 U.S. at 162). Based on the evidence in the record, Louboutin's trademark should be limited to a red lacquer sole that contrasts with the upper portion of the shoe. Thus, YSL was permitted to sell its monochromatic shoe.2 Today, the most well-known single-color marks are UPS's brown mark as applied to its delivery trucks, Tiffany's eggshell blue mark as applied to its packaging, Boise State's blue turf, and John Deere's green and yellow mark as applied to its various farm and industrial equipment. In all these instances, the applicant demonstrated that the mark had acquired secondary meaning. In what has been discussed as an important 2020 trademark case that may make it easier to obtain marks based on color, In Re Forney Industries, Inc.3, the D.C. Federal Circuit Court found that a distinct color-based product packaging mark can indicate the source of the goods to a consumer and, therefore, can be inherently distinctive without proof of the mark having acquired secondary meaning. The mark in question consisted of "a blending of the colors red into yellow with a black banner located near the top as applied to packaging" for metal hardware, welding equipment, safety goods, and marking products. It remains to be seen whether this decision has any impact on the number of applicants for this type of mark. A trademark used intrastate is protected under state common law. To be protected in interstate use, the trademark must be registered with the U.S. Patent Office under the Lanham Act of 1947. If a mark is registered, the holder of the mark may recover damages from an infringer who uses it to pass off goods as being those of the mark owner. The owner may also obtain an injunction prohibiting the infringer from using the mark. (Only the latter remedy is available for an unregistered mark.) Once the mark is registered, the registration must be renewed between the fifth and sixth years. After that initial renewal, the mark holder must renew the registration every 10 years. (If the mark was initially registered before 1990, however, renewal is necessary only every 20 years.) Page 185 To register a mark with the Patent Office, one must submit a drawing of the mark and indicate when it was first used in interstate commerce and how it is used. The Patent Office conducts an investigation to verify those facts and will register a trademark as long as it is not generic, descriptive, immoral, deceptive, the name of a person whose permission has not been obtained, or substantially similar to another's trademark. While the identification of a generic term may sound straightforward, as the U.S. Supreme Court case below illustrates, sometimes changes in technology make it less easy to determine

whether a term is generic. CASE 8-2 U.S. PTO v. BOOKING.COM B.V. 140 S. Ct. 2298 (2020) FACTS: Respondent Booking.com is a digital travel company that provides hotel reservations and other travel services under the brand “Booking.com,” which is also the domain name of its website. Booking.com filed applications to register four marks in connection with travel-related services, each with different visual features but all containing the term “Booking.com.” The U. S. Patent and Trademark Office (PTO) concluded that “Booking.com” is a generic name for online hotel-reservation services and denied them registration for the marks. Booking, they reasoned, was a generic term for making travel arrangements and .com indicated a commercial website, and so consumers would believe it referred to a class of online travel reservation systems. Alternatively, they held that even if it was descriptive and not generic, it had not acquired secondary meaning and therefore was not eligible to be registered. Booking.com sought judicial review and introduced evidence of consumers’ perceptions of the term. The District Court determined that “Booking.com”—unlike the term booking standing alone—is not generic. The court found that the consuming public primarily understood that BOOKING.COM does not refer to a genus, but rather it is descriptive of services involving ‘booking’ available at that domain name. The Court of Appeals affirmed, finding no error in the District Court's assessment of how consumers perceive the term “Booking.com.” The appellate court also rejected the PTO's contention that, as a rule, combining a generic term like “booking” with “.com” yields a generic composite. The PTO appealed to the U.S. Supreme Court. ISSUE: Does combining a generic term with “.com” necessarily lead to the creation of a non-registerable generic term? REASONING: The PTO's proposed rule does not follow from the established rule that adding a generic corporate designation like “Company” to a generic term does not confer trademark eligibility. While a term like company added to a generic term conveys no source information, adding.com to a generic term does in fact give source-identifying information because only one entity can occupy a particular Internet domain name at a time, so a “generic.com” term could convey to consumers an association with a particular website. Moreover, an unyielding legal rule that entirely disregards consumer perception is incompatible with a bedrock principle of the Lanham Act: The generic (or nongeneric) character of a particular term depends on its meaning to consumers. In the case of Booking.com, consumers identified the term with a specific website and not with a generic class of services providing online bookings. SIGNIFICANCE OF THIS CASE: This case is significant because it settles an important issue of whether “generic.com” is eligible for trademark protection. It also illustrates the importance of the concept of secondary meaning. CRITICAL THINKING What analogy did the high court find to be flawed? Why do you agree or disagree with the court’s view of this analogy? ETHICAL DECISION MAKING Which values are furthered by this decision? Page 186 Until 2017, the Lanham Act also banned the registration of marks that were disparaging. That year, the lead

singer of an Asian American rock group challenged the decision of the PTO to not grant them a trademark for the name of their band, the Slants, because it was disparaging. While the Supreme Court did agree that the term was disparaging, they struck down the provision of the act banning registration of disparaging terms as being violative of the First Amendment.4 While some had feared that this change in the act would lead to an increase in the number of controversial trademarks being registered, those fears appear to have been unwarranted. Interestingly, the decision in this case appeared to have given the owners of the team formerly known as the Washington Redskins a basis for appealing the PTO's decision to cancel their trademark on grounds that it was offensive to Native Americans, but they did not do so, and in fact changed their name. Recently, a number of celebrities have sought trademark protection for what some see as marks that might not really serve the purpose of identifying a product with its producer. For example, in 2015, Donald Trump received trademark protection for "Make America Great Again." Taylor Swift sought trademark protection for the phrases, "nice to meet you" and "where you been" on guitar picks, jewelry cases, and other consumer goods. Athletes are joining the trademark game, with football player Tim Tebow seeking to own the phrase "Tebowing," and basketball player Jeremy Lin seeking to trademark "Linsanity." It is sometimes difficult to determine whether a trademark will be protected. Also, once a trademark is registered, it is not always easy to predict whether a similar mark will be found to infringe on the registered trademark. The primary issue is whether consumers are likely to be confused by the two marks. This decision is based on factors such as the similarity of the marks; the similarity of the products or services in issue; the sophistication of consumers; and even the intent of the defendant to palm off its product as that of another. Case 8-3 demonstrates a typical analysis used in a trademark infringement suit. CASE 8-3 TOYS "R" US, INC. v. CANARSIE KIDDIE SHOP, INC. District Court of the Eastern District of New York 559 F. Supp. 1189 (1983) FACTS: In 1961, plaintiff Toys "R" Us, Inc., obtained a trademark for "Toys 'R' Us" and aggressively advertised its products, children's toys and clothing, in stores across the country. In the late 1970s, defendant Canarsie Kiddie Shop opened two clothing shops called "Kids 'r' Us" within 2 miles of a Toys "R" Us shop. The defendant never tried to register its name. Toys "R" Us sued for trademark infringement in federal district court. ISSUE: Does "Kids 'r' Us" infringe on the "Toys 'R' Us" mark? REASONING: To determine the likelihood of confusion associated with the defendant's mark, the court considered these factors: Strength of the senior user's mark: A mark can fall into one of four general categories, which, in order of ascending strength, are (1) generic (is entitled to no protection); (2) descriptive (has a secondary meaning and informs public about uses of product); (3) suggestive (suggests qualities of product but requires imagination); and (4) arbitrary or fanciful (does not describe the qualities of the product). The plaintiff's mark has a strong secondary meaning as a source of children's products, so the court determines

the mark has medium strength. But it falls short of the arbitrary or fanciful protection. Degree of similarity between the two marks: The key question is whether consumers have the impression that purchasing from the junior user is purchasing from the senior user. Both parties use the phrase “R Us.” However, the plaintiff uses an inverted capitalized “R,” whereas the defendant uses a noninverted lowercase “r.” The plaintiff uses “Toys” while the defendant uses “Kids.” The plaintiff’s letter is usually multicolored. Proximity of the products: Both the plaintiff and the defendant sell children’s clothing and are direct competitors. The likelihood that plaintiff will bridge the gap: First, the senior user will expand sales efforts to compete with the junior user. Second, consumers will assume that both parties are related companies. Evidence of actual confusion: When there is proof that consumers are actually confused by the use of the name, the senior user has a stronger case. Junior user’s good faith: The owner of Kids ‘r’ Us asserted that he did not recall whether he was aware of the plaintiff’s mark. The court does not believe him and concludes that the defendant adopted the “Kids ‘r’ Us” mark with knowledge of the plaintiff’s mark. Quality of the junior user’s product: The court is much more concerned about the possible violation if the quality of the clothing is poor because such clothing would then reflect poorly on the senior user. Sophistication of the purchasers: Because children’s clothing is not a major expenditure, customers will not exercise the same degree of care in evaluating the clothes. Junior user’s goodwill: The junior user did not expend a lot of money advertising and promoting its own name. Thus, the defendant doesn’t have a strong equitable interest in retaining its name. DECISION AND REMEDY: Judgment for the plaintiff. The defendant’s use of its mark creates the likelihood of confusion and constitutes trademark infringement. SIGNIFICANCE OF THE CASE: This case clarifies the factors to consider in a trademark infringement case. CRITICAL THINKING How does this case depend to a large extent on the definitions of a few particular terms? How good are the definitions used? What standard are you using to determine whether the definitions are good? ETHICAL DECISION MAKING If you were the owner of Canarsie Kiddie Shop, Inc., how would your decision to refer to your store as “Kids ‘r’ Us” change if you were to act in accordance with the Golden Rule? What values are in conflict when considering the decisions of the owner of Canarsie Kiddie Shop, Inc., and of one who follows the Golden Rule? Page 187 The term trade dress refers to the overall appearance and image of a product. Recall that, as described in the Chapter Opener, the shape and design of Apple’s iPhone is an example of trade dress. Trade dress is entitled to the same protection as a trademark. The main focus of a case of trade-dress infringement is usually on whether there is likely to be consumer confusion. For example, in a recent case,5 Tour 18, Ltd., a golf course, copied golf holes from famous golf courses without permission of the course owners. In copying a hole from one of the most famous courses in the country, Harbour Town Hole 19, Tour 18 even copied the Harbour Town lighthouse, which is the distinctive

feature of that hole. In its advertising, Tour 18 prominently featured pictures of this hole, including the lighthouse. The operator of the Harbour Town course sued Tour 18 for trade-dress infringement. The court found that there was infringement and made Tour 18 remove the lighthouse and disclaim in its advertising any affiliation with the owner of the Harbour Town course. E-COMMERCE and the Law Domain Names and Trade Names If you have a very strong trademark, what better domain name to have than that trademark? Unfortunately, the same trademark may be owned by two companies selling noncompeting goods, yet there can be only one user of any single domain name. For example, “apple” is a trademark owned by both a computer company and the company that produces the Beatles’ records. Both cannot establish a site identified as apple.com. Domain names are important because they are the addresses by which people and businesses are located on the web. A domain name is made up of a series of domains separated by periods. Most websites have two domains. The first-level domain, the one that the address ends with, generally identifies the type of site. For example, if it is a government site, the domain name will end in gov; an educational site, in edu; a network site, in net; an organization site, in org; and a business site, in com. These top-level domain names are the same worldwide. The second-level domain is usually the name of whoever maintains the site. For a college, for example, it would be an abbreviation of the college name, such as bgsu. Businesses generally want to use their firm name or some other trademark associated with their product because that name will obviously make it easiest for their customers to find them. So how does a firm go about securing a domain name that reflects its trademark? Network Solutions, Inc. (NSI), which is funded by the National Science Foundation, is responsible for registering domain names. This entity acts on behalf of the Internet Network Information Center, which handles the daily administration of the domain name system in the United States. Initially, a person applied to the NSI to use a specific domain name, and as long as no one else held that name, registration was granted. Since 1995, however, the NSI has been a little more careful in handing out names. Anyone seeking to register a domain name must now state in the application that the name will not infringe on anyone else’s intellectual property rights and that the registrant intends to use the name on a regular basis on the Internet. A party may lose registration of a name by not using it for more than 90 days. Or the domain name may be canceled if the registrant lied on the registration application. If you have a registered trademark and you find that a party is using your trademark as a domain name and that party does not also have ownership of that mark, you may give written notice to the NSI; under its domain dispute policy, it will most likely put the name on hold, meaning that no one can use the name. Of course, if that party had registered its domain name before you obtained the trademark, there is probably nothing you can do. The party will be entitled to retain the domain name. Some firms have tried to get the domain name they desire by going to another country. That alternative is certainly a

possibility. However, many countries require your firm to be incorporated within their borders before you can gain the right to the domain name there. An additional problem is that trademark law relating to domain names is even more unclear abroad. For the new entrepreneur, the best advice is to apply for federal trademark protection and register the domain name simultaneously. And for those not yet on the web, the sooner you get your domain name, the more likely you are to get the name you want. If you feel that your mark is being violated by another's domain name, you may want to sue the party for infringement because the unauthorized use of another's trademark in a domain name has been found to be illegal. But you may be in for quite a fight because this is a new area of the law. Copyrights Copyrights protect the expression of creative ideas. That is, they do not protect the ideas themselves but protect only the fixed form that expresses the ideas. Copyrights protect a diverse range of creative works, such as books, periodicals, musical compositions, plays, motion pictures, sound recordings, lectures, works of art, and computer programs. Titles and short phrases may not be copyrighted. Page 188 There are three criteria for a work to be copyrightable. First, it must be fixed, which means set out in a tangible medium of expression. Second, it must be original. Third, it must be creative. A copyright automatically arises under common law when the idea is expressed in tangible form. However, if the work is freely distributed without notice of copyright, the work falls into the public domain. A copyrighted work that is reproduced with the appropriate notice affixed is protected for the life of its creator plus 70 years. Under the common law of copyright, an infringer may be enjoined only from reproducing a copyrighted work. For the creator to be able not only to seek an injunction but also recover damages arising from the infringement, the copyrighted work must be registered. One may register a work by filing a form with the Register of Copyrights and providing two copies of the copyrighted material to the Library of Congress. Whenever the work is reproduced, the appropriate notice of copyright should accompany it, although such notice is no longer required by law. Printed works, for example, should be published with the word copyright and the symbol © or the abbreviation copr., followed by the first date of publication and the name of the copyright owner. Once the work is registered, as long as it is always accompanied by the notice of copyright when reproduced, the holder of the copyright has the additional right to sue an infringer for damages caused by the infringer's use of the copyrighted material and to recover any profits made by the infringer on the copyrighted material. Page 189 It is not always easy to determine whether a copyright has been infringed, even when two works are similar. After all, if we are talking about creative works, such as photographs of a famous scene, two people might independently take a very similar picture at completely different times and without even knowing of each other's work. The following Case Nugget illustrates the court's reasoning in a successful copyright infringement case. CASE Nugget A Question of Whether There Was Copying Ty, Inc. v. GMA Accessories, Inc. U.S. Court of Appeals,

Seventh Circuit 45 U.S.P.Q. 1519 (1998) Ty began selling Beanie Babies, and then GMA started selling bean-bag stuffed animals three years later. Ty sought an injunction under the Copyright Act to stop the sale of GMA's Preston the Pig and Louie the Cow. Ty argued that these animals violated its copyrights for Squealer (a pig) and Daisy (a cow). Ty was successful in obtaining an injunction for copyright after the court asked the following questions: Did the alleged copier have access to the work he or she potentially copied? Did he or she actually copy the work? The court found that access (and copying) may be inferred when the two works are so similar and unlike anything in the public domain that it is likely the second user copied the first. This inference can be rebutted by disproving access or showing independent creation. Looking at pictures of the two cows compels an inference of copying. If GMA must have had access to Ty's cow, it must have had access to the pig, too. GMA's pig is strikingly similar to Ty's pig but not to anything in the public domain (e.g., a real pig). The only evidence GMA presented was an affidavit by the designer, who swears she never looked at Squealer. However, the actual bean-bag animal looks more like Ty's design than the designer's drawing. The fair-use doctrine provides that a portion of a copyrighted work may be reproduced for purposes of "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarships, and research." In determining whether the fair-use doctrine provides a valid defense to a claim of copyright infringement, Section 107 of the Copyright Act requires the court to weigh the following four factors: the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and the effect of the use on the potential market for or value of the copyrighted work. E-COMMERCE and the Law Changes to Copyright Law as Technology Evolves Copyright law has also undergone multiple changes as new ways to reproduce and distribute copyrighted content multiply alongside frequent new developments in technology. For example, in 2014's Broadcasting Cos. v. Aereo, Inc.,6 the Supreme Court had to decide whether or not a new twist on an old technology was violating copyright laws. To understand the case, one must first understand the technology Aereo was using. Aereo had set up banks of tiny digital antennas that would receive over-the-air television signals that were being broadcast by television companies. A computer attached to each antenna would then make a copy of the signal's data and then transmit this data to an Aereo user. This allowed Aereo subscribers to watch television shows on non-television devices using the Internet. While Aereo users paid for the service, Aereo did not pay the company that originally broadcast the copyrighted material. Aereo argued that because it created a unique, separate copy of a transmission for each user, and each copy was being sent to one user only, Aereo was not creating a "public performance" and therefore was not infringing on the broadcasters' copyrights. In his majority opinion, Justice Breyer disagreed, saying that Aereo "performed" by transmitting and that the "performance" was indeed

public because, “when Aereo streams the same television program to multiple subscribers, it transmits . . . a performance to all of them.” This type of case has become increasingly common in an age where communication technology is constantly evolving. In the 1970s, Sony developed a format for videotaping called Betamax. Film studios brought suit against Sony in 1976, arguing that taping a television show was copyright infringement. The district court concluded that recording a show for personal, noncommercial use was fair use, but the appellate court disagreed and found Sony liable. The Supreme Court ultimately ruled on this issue in 1984, agreeing that recording a television program for the noncommercial purpose of time shifting is fair use.7 Page 190 In 1994, the Supreme Court decided that commercial parody may be fair use. In that case, 2 Live Crew, a rap group known for its explicit lyrics, recorded and released a song called “Pretty Woman,” which was a parody of Roy Orbison’s “Oh, Pretty Woman.” The Supreme Court considered the four factors listed previously. With respect to the purpose and character of the use, the more transformative the new work is, the less courts will need to focus on the other three factors. As technology has continued to develop, copyright enforcement has remained an important concern. For example, Napster was a peer-to-peer file sharing network by which one user could download a file from another user for free. Files that were typically transferred were digital music files. The record industry brought suit against Napster and received a preliminary injunction to stop the exchange of digital music files. Napster appealed to the Ninth Circuit Court of Appeals, which affirmed the preliminary injunction.8 Napster made several arguments regarding fair use. Like the time-shifting purpose in the Betamax case, Napster argued that users were engaging in space shifting (i.e., transferring music files from CDs they had purchased to their computers). However, the court found that although the user may have been transferring the format (from CD to computer file) for personal use, the user was necessarily sharing the files with other users, which was not a fair use. GLOBAL Context Digital Archive Japan/Alamy Stock Photo Comparing the Law of Other Countries: The EU’s General Data Protection Regulation The General Data Protection Regulation (GDPR) is a European Union (EU)-wide law that protects an individ-ual’s (“data subject”) personal data that took effect on May 25, 2018. The GDPR applies to EU-based businesses and any non-EU entity that offers goods or services to individuals in the EU. This includes U.S. firms doing business in the EU. Among various mandates, the GDPR gives individuals the right to access any personal data col-lected. The GDPR also prohibits companies from gath-ering, keeping, and communicating personal data about individuals without valid legal grounds or a data subject’s explicit consent. Firms that violate the GDPR can be fined the greater amount between €20 million or 4 percent of annual revenue. The GDPR poses several issues for the U.S. intellectual property field. A patent attorney will have to collect and submit personal information, such as the name of the inven-tor, to file a patent. While it seems unlikely that an inventor would not consent to have personal

information used that way, the GDPR allows an individual to withdraw consent at any time. The GDPR classifies data-users “controllers” and “processors.” Controllers determine the purpose of processing the data and have higher standards. When an IP attorney files an application for their client, who is the controller and who is the processor of the inventor’s personal data? One of the biggest challenges in enforcing IP rights is identifying the infringer. Typically, an IP-rights holder will ask internet service providers or domain name registrars for information such as IP addresses and email addresses, which are considered personal data under the GDPR. Because information necessary to catch IP-infringers can be personal data, IP-rights holders may face delays or incomplete data when requesting it from EU organizations. However, under EU Directive 2004/48 on the enforcement of intellectual property rights, national courts may grant orders to provide personal data. Finally, a question remains as to where personal data ends and where intellectual property begins. Under the GDPR's right of access, a French journalist asked Tinder for her personal data—and got back 800 pages of it. The data included matters such as every message the journalist ever sent, what she liked on Instagram and Facebook, and the percentage of different races she matched. Nevertheless, the data did not include how Tinder personalized the data. When pressed, Tinder refused to give the journalist access, stating, “[o]ur matching tools are a core party of our technology and intellectual property.”9 Exhibit 8-6Trademark and copyright symbols HOW DO I KNOW IF AN IMAGE HAS BEEN PROTECTED BY A TRADEMARK OR COPYRIGHT? Images that have been legally deemed a trademark or copyright protected often include small indications that the image in question is not available for public use. The absence of such symbols, however, should not be relied upon to definitively indicate that the image is not protected. These indicators include • The copyright symbol: © • The trademark symbol: ™ • The registered trademark symbol: ® Patents A patent protects a product, process, invention, machine, or a plant produced by asexual reproduction. For this protection to be granted, three criteria must be satisfied. First, the object of the patent must be novel, or new. No one else must have previously made or published the plans for this object. Second, the object must be useful unless it is a design. It must provide some utility to society. Third, the object must be nonobvious. The invention must not be one that a person of ordinary skill in the trade could have easily discovered. When a patent is issued for an object, it gives its holder the exclusive right to produce, sell, and use the object of the patent for 20 years from the date of application. The holder of the patent may license, or allow others to manufacture and sell, the patented object. In most cases, patents are licensed in exchange for the payment of royalties, a sum of money paid for each use of the patented process. Page 191 BUT WHAT IF. . . WHAT IF THE FACTS OF THE CASE OPENER WERE DIFFERENT? What if Samsung had presented evidence at the trial that half of the phones on the market at the time of the trial that were made by companies other than Apple or Samsung also shared the iPhone’s design of being

rectangular with rounded corners? Page 192 The only restriction on the patent holder is that he or she may not use the patent for an illegal purpose. The two most common illegal purposes are tying arrangements and cross-licensing. A tying arrangement occurs when the holder issues a license to use the patented object only if the licensee agrees to buy some nonpatented product from the holder. Cross-licensing occurs when two patent holders license each other to use their patents only on the condition that neither licenses anyone else to use his or her patent without the other's consent. Both of these activities are unlawful because they tend to reduce competition. To obtain a patent, one generally contacts an attorney licensed to practice before the U.S. Patent Office. The attorney does a patent search to make sure that no similar patent exists. If none exist, the attorney fills out a patent application and files it with the Patent Office. As part of the application process, the inventor has a duty to disclose any prior art he or she is aware of related to the invention, including other patents. The Patent Office evaluates the application, and if the object meets the criteria already described, a patent is issued within approximately two years. Although two years may seem like a long time, it is short compared to the six years it typically takes to secure a patent in Japan. Once the patent is issued, the holder may bring a patent infringement suit in a federal court against anyone who uses, sells, or manufactures the patented invention without the permission of the patent holder. A successful action may result in an injunction prohibiting further use of the patented item by the infringer and an award of damages. Sometimes, however, the result of the case is that the holder loses the patent. This loss would occur if the infringer can prove that the Patent Office should not have issued the patent in the first place. Another way in which a potential patent infringer may attempt to challenge a patent is to ask the United States Patent and Trademark Office (USPTO) to reexamine the patent. Through the reexamination process, a party presents what it argues is invalidating prior art (i.e., patents, articles, or products that disclosed all features of the invention before the patent-at-issue was granted). The USPTO then considers whether the patent should have, in fact, been issued. Reexamination requests are frequently granted, and it may take several years for the USPTO to consider whether a patent should have been issued. Thus, reexaminations are tools defendants frequently use to slow down or even pause litigation because a court may prefer the USPTO to complete the reexamination before litigation may proceed. BUT WHAT IF. . . WHAT IF THE FACTS OF THE CASE OPENER WERE DIFFERENT? What if Samsung had been able to bring in evidence that Samsung, in fact, sold a phone with a design similar to the iPhone's before the iPhone had come out? Would that fact have affected the outcome of the case with respect to Apple's claim of infringement on its design patent? The America Invents Act In 2011, Congress passed the America Invents Act, which changed the U.S. patent system in several important ways. First, the first person to file a patent application in the United States for an invention will be deemed to have rights to the invention. This is a change from

the previous policy, by which the first person to invent had the rights to the invention. This change is important because in the past, employees could keep diligent records and take their time applying for the patent. The European and Japanese patent systems also have a first-to-file rule. Second, the act expands the types of prior art that may be considered by the USPTO when granting a patent, which would arguably make it more difficult to obtain a patent. Third, the act makes changes to the reexamination process, making the process more like litigation by allowing discovery requests during the process. Fourth, the act prohibits a plaintiff from filing one suit against many unrelated defendants, which has typically increased the number of patent infringement cases filed. Finally, the act makes it easier and more affordable for small businesses and sole entrepreneurs to apply for patents. Page 193 Trade Secrets A trade secret is a process, product, method of operation, or compilation of information that gives a businessperson an advantage over competitors. Inventions and designs may also be considered trade secrets. Furthermore, a company's client list (or an employee's contact list) could be considered a trade secret. A trade secret is protected by the common law from unlawful appropriation by competitors as long as it is kept secret and consists of elements not generally known in the trade. Competitors may discover a secret by any lawful means, such as by doing reverse engineering or by going on public tours of plants and observing the use of trade secrets. Lawful discovery of a secret means there is no longer a trade secret to be protected. When an employee leaves a company to work for a competing company, the original company frequently investigates whether the employee has taken any trade secrets to the competitor. According to one study, 59 percent of departing employees take confidential information from the employer when leaving.10 To ensure that confidential information is protected, companies should consider creating a policy stipulating that any trade secret information must be labeled Confidential or Trade Secret by employees (which would help the employer maintain a trade secret claim) and limit access to this confidential information within the company. If a competitor acquires a trade secret by unlawful means, the originator of the secret can take legal action. To enjoin such a competitor from continuing the use of a trade secret and/or to recover damages caused by the use of the secret, a plaintiff must prove that a trade secret actually existed, that the defendant acquired it through unlawful means, and that the defendant used the trade secret without the plaintiff's permission. A common dilemma facing an inventor is whether to protect an invention through patent or trade-secret law. If the inventor successfully patents the invention and defends the patent, the inventor has a guaranteed exclusive monopoly on the use of the invention for 20 years, a substantial period of time. The problem is that once this period is over, the patented good goes into the public domain and everyone has access to it. There is also the risk that the patent may be successfully challenged and the protection lost prematurely. Trade-secret law, on the other hand, could protect the invention in perpetuity. The problem is that once

someone discovers the secret lawfully, the protection is lost. CASE OPENER WRAP-UP Smartphone Wars: Focus on Intellectual Property Rights In August 2012, Apple and Samsung participated in a four-week jury trial regarding patent infringement and trademark claims. Both Apple and Samsung asserted patents in this trial; however, the jury found that (1) Samsung infringed Apple's patents, (2) Apple did not infringe Samsung's patents, and (3) the trade dress of Apple's iPhone was diluted by some of Samsung's products. The jury awarded Apple over $1 billion in damages, which was one of the highest patent infringement awards in history. Prior to the trial, the judge issued a preliminary injunction that prevented Samsung from selling one of its tablets. However, following the trial, the injunction was lifted. Page 194 PRACTICAL TIPS for Business Managers Before starting a business in a certain area of your city, be sure to learn about the local zoning ordinances to ensure that it is even legal to operate a business in that part of town in the first place. This tip is especially important if you decide to run a business out of your home; many zoning laws do not allow businesses in residential areas except under very particular circumstances. When deciding to start a new business, you need to decide whether to lease or purchase the real property on which you pan to do business. The answer to this question relies on several factors. Do you think your business will outgrow the space? Do you want to deal with maintaining the property? How long do you intend to operate your business on that property? As a rule of thumb, it is generally cheaper in the long run to buy if you plan to operate a business on a piece of property for longer than seven years. If you or an employee invent a new piece of intellectual property, it is very important that you patent it, register it as a trademark, or receive copyright protections as soon as possible. Failure to do so could lead to a competitor learning about the idea, beating you to the Patent and Trademark Office, and profiting from your idea. Be sure to keep intellectual property currently in development a secret. Hire employees you can trust, and enforce strict internal security policies to ensure that your competitors do not learn about your ideas and secure a patent before you can. Remember that, once you secure a trademark, it is your duty to uphold its uniqueness by preventing dilution and actively fighting against parties that use the trademark without permission. Failure to do so can result in the abandonment of the trademark, meaning your firm no longer holds the rights to the mark.

SUMMARY The Nature of Real and Intellectual Property Real property is land and anything permanently affixed to the land. Intellectual property is property that is primarily the result of mental creativity rather than physical effort. Real Property Fee simple absolute: Right to possess for life and devise to heirs on death; the most encompassing interest. Conditional estate: Right that is comparable to a fee simple absolute except that the interest will terminate on the happening or nonhappening of a specified condition. Leasehold estate:

Right to possess property for an agreed-on period of time. Easement: Irrevocable right to use a portion of someone else's land for a specified purpose. License: Right to use another's property temporarily. Personal property Personal property is all property that is not land or permanently affixed to land. Voluntary transfer of personal property: Property can be transferred by purchase or by gift. Involuntary transfer of property: If property is lost, mislaid, or abandoned, a new owner acquires title to the property through possession. Intellectual Property A trademark is a distinctive mark, word, design, picture, or arrangement that a producer uses in conjunction with a product and tends to cause the consumer to identify the product with the producer. Trademarks used in interstate commerce can be protected under the Lanham Act. A copyright protects the fixed form of the expression of an original, creative idea. The most common defense to an allegation of copyright infringement is the fair-use doctrine, which provides that a portion of a copyrighted work may be reproduced for purposes of "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarships, and research." A patent protects a product, process, invention, machine, or plant produced by asexual reproduction that meets the criteria of being novel, useful, and nonobvious. Obtaining a patent under the Lanham Act allows the holder to license the use of his or her patented idea for royalties as long as the holder does not enter into a tying arrangement or engage in cross-licensing.

Point/Counterpoint The process of applying for a patent and keeping a patent can be difficult and costly. As you know, an alternative to patenting an invention is to protect it through trade-secret law. Should Corporations Be Allowed to Patent Genes? YES NO While they are often not the first thing that comes to mind when considering intellectual property, most synthetic genes are allowed to be patented. The patenting of genes brings with it many benefits for both businesses and consumers. First of all, allowing a business to patent a gene gives the firm exclusive rights to look at and experiment with the gene for the patent's duration. This exclusivity means that the firm with the patented gene would have ample time to examine the gene and develop its usefulness to the fullest without worrying about a competitor beating them to market with a product based on the gene. The time allowed by the patent may also help small businesses that discover a particular synthetic gene compete against larger businesses that would otherwise have the resources to always beat out the smaller company. Another benefit of gene patenting is that the promise of exclusive rights to a synthetic gene sequence could spur innovation. As with most other industries, gene patents would protect the rights of innovators and guarantee that the time and resources spent developing a test or drug from a gene won't be undercut by a competitor. The potential increase in innovation could lead to a greater quantity and quality

of discoveries brought upon by researching the genes. Finally, gene patents make what is normally an unprofitable area of research potentially profitable. Without the patents, there is nothing stopping a competitor from releasing a generic version of a drug or treatment developed by a firm after studying a gene. Not only would the patents help secure profits for innovating firms and therefore provide more incentive to pursue gene research, but the higher likelihood of profits could also mean more people would be willing to invest in gene research. Increased investment could lead to a cycle of better gene-derived products, which means higher profits, which again could mean more investment. While the Supreme Court has ruled that naturally occurring human genes cannot be patented, it has allowed for synthetic genes not found in nature to be patented. However there are several reasons why even the patenting of synthetic genes goes too far. First, exclusive rights to a synthetic gene and the products derived from the gene means no competition. A lack of competition can, in turn, lead to arbitrarily high prices that consumers have to pay if they wish to treat an illness that can only be cured by a product that a single firm holds the rights to. People who could not afford treatment could very well die before the patent expires and another company can provide a cheaper alternative. Second, allowing only one company to interact with a particular gene simply means fewer individuals working with the gene and could therefore slow down innovation as a whole in regards to developing products with said gene. Gene patenting also effectively puts one firm in control of a gene, and whether or not cures or life-improving products are developed for consumers who need them is decided entirely by that single business for the duration of the patent. Third, because naturally occurring genes are not allowed to be patented while synthetic genes are, there could be a massive shift away from studying natural human genes toward the more profitable synthetic genes. While there are many breakthroughs to be had in the realm of synthetic genes, there are still many important discoveries to be made in the natural genes area as well.

Questions & Problems Explain the bundle-of-sticks idea as it relates to real property. Explain the five possessory interests in land. Explain the bundle-of-sticks idea as it relates to intellectual property. How are trademarks and patents different? Explain copyright infringement. Page 196 On September 8, 2011, John Barth purchased a piece of property at 4 Lynn Street in Peabody, Massachusetts, for $1,000. Barth subsequently requested the City of Peabody to grant a variance to exempt his property from the local zoning ordinance. The City of Peabody's Zoning Board of Appeals held a public hearing and later voted to deny the variance. Following the refusal, Barth filed a pro se complaint alleging 23 "violations of law." Of the many claims Barth made, he specifically argued that the denial of his zoning variance request constituted a violation of the Fifth Amendment's Taking Clause. Barth

contended that the denial amounted to a taking because it deprived him of the use and enjoyment of the land. Do you think the denial of the variance could legally be considered a taking? Source: Barth v. City of Peabody, U.S. Dist. LEXIS 4080 (2017). Adrian Samalia fled a stolen vehicle during a lawful traffic stop. While Samalia successfully escaped, he left his cell phone in the stolen vehicle. Police officers searched the cell phone without a warrant and used the information contained in it to confirm Samalia's identification. The data from the phone was used as evidence in a trial against Samalia for possession of a stolen vehicle. Samalia moved to suppress the evidence, arguing that his constitutional rights were violated when they searched the phone without a warrant. The State contended that the warrantless search was allowed under the abandonment doctrine. The trial court denied the motion to suppress and eventually found Samalia guilty. After a series of appeals, the case worked its way up to the Supreme Court of the State of Washington. Under the abandonment doctrine, an individual loses his or her privacy interest in a property if he or she voluntarily abandons it. While Samalia argued that the abandonment doctrine should not be applicable to cell phones because they hold "private affairs," the Washington Supreme Court ruled that there would be no exception to the abandonment doctrine for cell phones. At this point for the State to prevail, it had to show that Samalia voluntarily abandoned his cell phone. Do you think the cell phone left by Samalia as he ran from the police was voluntarily abandoned? Explain why or why not. How did the Washington Supreme Court rule on this issue and what was its reasoning? Do you agree? Why or why not? Source: State v. Samalia, 375 P. 3d 1082 (2017). Thomas Garrison transferred title on two cars to one of his sons, Jay Garrison, while on his deathbed. After Thomas passed, his widow Pamela Garrison filed a petition to recover the cars as the representative of the estate. Pamela challenged Thomas's competency to make inter vivos gifts of the cars. The trial court ruled that the cars were actually gifts causa mortis and concluded that the evidence of Thomas's competency to make such a gift was evenly split. Because the evidence was equal, the trial court ruled the cars had to be returned to the estate. Jay appealed the decision, contending that the trial court should have concluded the cars were a gift inter vivos and not a gift causa mortis. The type of gift matters because different standards apply for each one. According to the appellate court, the burden of showing whether a gift qualifies as an inter vivos gift is a preponderance of the evidence. On the other hand, evidence must be clear and convincing to establish a gift as a gift causa mortis. Why do you think the standard for the gift causa mortis is more stringent than for the inter vivos gift? Source: Garrison v. Garrison, 71 NE 3d 423 (2017). Stone Brewing Co. is a San Diego brewer that has maintained its trademark and brand from the beginning, registering the STONE mark in 1998. Since 1989, Miller has sold the Keystone brand of beers. In 2017, Miller undertook efforts to "refresh" its Keystone image by updating the can and package design. The new can design took "KEYSTONE" and separated "KEY" and

“STONE” onto separate lines. The packaging emphasized “STONE” rather than “KEYSTONE.” Alongside the redesign, Miller introduced a new ad campaign with the slogan “Hunt the STONE.” Do you believe that MillerCoors’ use of the “KEYSTONE” mark infringe on Stone’s “STONE” mark? Source: Stone Brewing Co. v. MillerCoors, LLC, Dist. Court, SD California, 2019 U.S. District Lexis 52153. When William S. Thrasher died, he left a life estate in the family home to his wife, Gail Thrasher, and a remainder interest to his children, James Hall Thrasher and Sheila Reed. When Gail attempted to sell her life estate, the children sued, arguing that by selling the life estate, she was forfeiting the life estate because the buyer might waste the property, thereby devaluing the interests of the children. How do you think the courts resolved this issue? Should the holder of the life estate be able to transfer the life estate? Source: Thrasher v. Thrasher, 169 So. 3d 1043; 2014 Ala. Civ. App. LEXIS (2014). Page 197 Beyoncé Knowles-Carter (“Beyoncé”) is a world-renowned music artist who is among the best-known figures in entertainment. Plaintiff BGK Trademark Holdings, LLC (“BGK”), is the owner of the federally registered trademark BEYONCÉ. Products that feature the BEYONCÉ mark are sold on the website Vargas Deck. Andre Maurice and Leana Lopez operate a business that sells clothing and apparel with the mark FEYONCÉ and certain phrases from Beyoncé’s well-known songs. After beginning to use the mark FEYONCÉ in commerce in at least March of 2016, defendants sold clothing items until at least October 26, 2016. From at least January 15, 2017, through May 15, 2017, defendants sold similar items on Etsy.com through a shop called “FeyonceShop.” On February 22, 2015, counsel for plaintiffs sent a cease-and-desist letter to defendant Maurice demanding that defendants stop using the FEYONCÉ mark, abandon their trademark applications, and transfer the domain name to plaintiffs. Not receiving a response, on April 5, 2016, plaintiffs filed a complaint against defendants Maurice and Lopez, in addition to Lee Lee and Feyonce, Inc., asserting causes of action for Federal Trademark Infringement. Do you believe Feyonce infringed upon the BEYONCÉ mark? Source: Knowles-Carter v. Feyonce, Inc., 347 F. Supp. 3d 217 (S.D.N.Y. 2018). The plaintiff sold his photography online. He sued defendants for copyright infringement. He believed that the defendants had obtained his photos illegally and placed one of these photographs, without the plaintiff’s permission, on a commercial Internet website they operated. After the defendants ignored a letter by the plaintiff demanding that the online photos be taken down, the plaintiff filed a copyright infringement case seeking $30,000 in damages. The owner also alleged that the defendants’ conduct constituted a willful violation of his copyrights. The court considered the following factors in determining whether a damages remedy existed: the infringer’s state of mind; the expenses saved by the infringer; the revenue lost by the copyright holder; the deterrent effect on the infringer and third parties; the infringer’s cooperation in the case; and the attitude and conduct of the parties. Based on the allegations stated above, do you believe that these factors merit a damages reward

of $30,000? In whose favor do you believe the court ruled? Explain your reasoning. Source: Oppenheimer v. Holt, No. 1:14-CV-000208-MR, 2015 WL 2062189 (W.D.N.C. May 4, 2015). Securities brokerage firm Charles Schwab filed suit against a former employee who left the company and started his own wealth management firm. Charles Schwab claimed that the names of its clients, along with information regarding their accounts and assets, were trade secrets. The employee therefore misappropriated these trade secrets when he contacted the clients to ask them to transfer their accounts to his new firm. Charles Schwab argued that the employee could not have learned of these individuals but for his work at the Charles Schwab brokerage. Do you think this customer information will be treated as a trade secret? What factors do you think the court will consider when determining whether the customer information is a trade secret? Source: Charles Schwab & Co. Inc. v. Douglas Castro, Case No. 650053/2013 (E.D.N.Y. January 7, 2013). Lynn Goldsmith is a photographer known for her photographs of famous musicians. In 1981, Goldsmith had a photography session with the singer Prince. Three years later, Vanity Fair obtained a license from Goldsmith's photography agency to use one of Goldsmith's Prince photographs "as an artist's reference in connection with an article to be published in Vanity Fair magazine." At the time, Goldsmith was not aware that her agency had licensed the photo graph. Vanity Fair commissioned Andy Warhol to create an illustration for an article about Prince. Warhol produced an illustration based on Goldsmith's licensed photograph, which was used in the published article. Warhol would go on to create the "Prince Series," composed of 16 different pieces of artwork, including the illustration used in the Vanity Fair article. Following Prince's death in 2016, Vanity Fair published an online copy of its 1984 article and a commemorative issue entitled "The Genius of Prince." Vanity Fair obtained a license from Warhol's estate to use the Prince Series works on the cover of the issue. The issue displayed a copyright credit to Warhol, not Goldsmith. Goldsmith saw the issue, and it was here that she first learned about Warhol's artwork. Goldsmith accused Warhol's estate of copyright infringement for using her photograph as the basis of the Prince Series. Warhol's estate moved to dismiss the claim, arguing that Warhol's use of the photograph was protected under fair use. What factors do you think the court considered in determining whether Warhol's artwork was protected by fair use? Source: The Andy Warhol Foundation for the Visual Arts v. Goldsmith,Case 1:17-cv-02532-JGK (S.D.N.Y. August 1, 2019).